Supreme Court, U.S.
FILED

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

WILLIAM WALSH
Petitioner,

vs.

SOUTHWEST FLAGLER ASSOCIATES, INC.
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE THIRD DISTRICT COURT OF APPEAL
OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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19pp

QUESTIONS PRESENTED

Testimony, that was to begiven by the medical doctor, who performed the surgery for the injury sustained in the accident, was ruled **"...inadmissible..."** by the trial court, because the surgeon was an employee of the Federal Government.

1. **Was the Court permitted to exclude testimony from a surgeon that is working for the Federal Government?**

There were records of the surgeon that were ruled **"...inadmissible..."** for the Plaintiff as they were records of someone employed by the Federal Government, however, the trial court permitted the Defendant to use these records to show the jury that the Plaintiff had surgery and loss of work and wages for reasons **"...unrelated to the accident."**

2. Was the Court correct in allowing the Defendant to use records of a Federal Government employee that were rule "...inadmissible..." for the Plaintiff, because they were records of a Federal Government employee?

During direct examination by the defense counsel, the independant medical examiner read from records of the surgeon who was employed by the Federal Government. These records were not authenticated by the Federal Government employee.

3. Was the Court correct in allowing records from an employee of the Federal Government to be read when these records were ruled "...inadmissible..." for the Plaintiff to use by the trial court?

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Petitioner, WILLIAM WALSH, respectfully requests that a Writ of Certiorari be issued to review the Judgement of The Third District Court of Appeal of Florida, entered on June 21, 1994, which Affirmed the Judgement of Petitioner previously entered in the Eleventh Circuit Court in and for Dade County, Florida.

OPINION BELOW

The opinion of the Third District Court of Appeal of Florida Affirming the decision of the Lower Tribunal is set forth in the Appendix.

STATEMENT OF JURISDICTION

The decision of the Third District Court of Appeal Affirming the decision of the Lower Tribunal was rendered on June 21, 1994. A Petition for Rehearing was denied on July 19, 1994. The jurisdiction of this Court to review the decision by Writ of Certiorari is invoked pursuant to the law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

> No State shall deprive any person of life, liberty or property, without due process of law; nor deny any person within it's jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

This is a case where the Plaintiff, WILLIAM WALSH, fell down the steps, in the dining room, owned and operated by the Defendant. Unknown to the Plaintiff, an eyewitness saw two waiters collide on the steps in the dining room, spilling trays of food and drinks to the steps. Approximately "...twenty-five minutes..." later the Plaintiff started down those same steps, when, "...wham, just like a bellyflop...on his front...fell fifteen to twentyfive feet..."

Ventral hernias, caused by the accident, formed in the abdomen of the Plaintiff. The Plaintiff was admitted into the VA Hospital where surgery was performed by a surgeon at the VA hospital. This surgeon was subpoenaed by the Plaintiff, however, was introduced to the Court, by defense counsel, as "...an expert." When the trial

court asked, "Who is presenting her testimony?" and the Plaintiff stated, "I am." defense counsel said, "That begins a precarious problem. I didn't know you were going to get this witness under the authority of the VA. She comes here as a records custodian. She has been told by her administrator, she is not entitled to give opinions." The trial court responded, "Here is the problem we have Mr. Walsh. She is an employee of the Federal Government. Generally speaking, federal government employer's take a position that their employee's are not bound to respond to subpoenas in the State Court. It relates to supremacy of the Federal Government. (This is all recorded in the trial transcript on pages 49-51).

The trial court would not allow this surgeon to testify or her records used as evidence. These records would prove the surgery was

needed to repair ventral hernia's times four (4), caused when the Plaintiff "...fell on his abdomen...at the dogtrack."

This surgeon was an expert witness, not a records custodian, as proclaimed by defense counsel, agreed to by the trial court and affirmed by the District Court of Appeal. This surgeon was not permitted to testify, however, the trial court allowed defense counsel to use these records and her deposition that was taken during the lunch break on the first day of the trial. The doctor would not sign the deposition as it could not be read or approved and the Court ruled this evidence as "...inadmissible..." for the Plaintiff, but admissible for the Defendant.

On page 270 of the trial transcript, defense counsel, Thomas Valerius was cross examining a witness who testified about the loss of income by the Plaintiff because of loss

of work.

MR. VALERIUS: The evidence will show he underwent surgeries unrelated to this accident, unrelated. No doctor is going to come in and say they are related and he was out of work for these problems (TT 270).

MR. VALERIUS: Did you know it was five days later that he was admitted for surgery on his stomach, did you know that?

MR. VALERIUS: Did you know that on Friday the first week he had set up surgery on his stomach, did you know that?

MR. VALERIUS: He was hospitalized for nine days. He was out of work because of hospitalization. The suchures were removed, did you know that?

MR. VALERIUS: Did you know that he was back in the hospital on April 29, for

herniation, did you know that?

MR. VALERIUS: And on March 29, you went to the VA Hospital to schedule surgery, is that correct?

MR. VALERIUS: You were admitted in the hospital April 8, 1994, and you were hospitalized, I believe, some eleven days?

MR. VALERIUS: And were you back in the hospital on the 29th?

MR. VALERIUS: After that, for quite awhile, you didn't work, is that correct?

The trial court allowed defense counsel to use records from a Federal Government employee that was not permitted to testify.

REASONS FOR GRANTING THE WRIT

I.

This petition for a writ of certiorari presents the significant question of whether as a matter of statutory construction - or due process of law - an employee of the Federal Government, who has performed surgery for an injury that was caused by the accident in question, can testify as an expert witness in a State Court? A case where the Defendant, during opening statement, did accept the negligence for the fall.

This surgeon may have been told by superiors not to give an opinion, however, did perform the surgery and her surgical records would prove the reason for the surgery was ...patient fell on his abdomen...at the racetrack, causing his initial hernia." Also, "...fell on his abdomen...at the dogtrack."

An eye witness, who was concealed by the

Defendant from November 18, 1989, until found, by the Plaintiff, May 14, 1991, saw the accident and what cause it. This witness testified that he saw the Plaintiff "...fall forward, doing a belly-flop...falling fifteen...to twenty-five feet."

During his Opening Statement, defense counsel told the jury, "We are not saying the man didn't fall. Evidence will prove that. But, what happened after the fall." Later counsel said, "...I didn't know you were going to get this witness under the authority of the VA."

This is why this writ must be granted. If this Federal Government employee was ordered to testify, a different verdict would have been handed down.

II.

How can evidence be "...inadmissible..."

for one party and allowed by another? This is what turned the jury and had this not been allowed, the verdict would have certainly gone for the Plaintiff, as it should have.

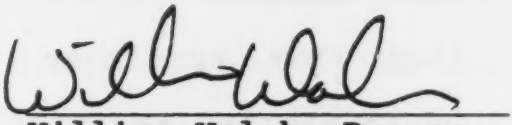
The Third District Court of Appeal affirmed this decision of the Lower Tribunal, knowing that this testimony and records were only available for the Defendant.

These are the reasons that this writ must be granted.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari must be granted.

Respectfully submitted,



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APPENDIX

IN THE CIRCUIT COURT
OF THE 11TH JUDICIAL
CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

WILLIAM WALSH, et al.,
Plaintiff,

Case No. 90-52609

vs.

FINAL JUDGEMENT

WEST FLAGLER ASSOC.
d/b/a FLAGLER DOG
TRACK.
Defendants.
_____/

This action having been tried before a duly empaneled jury and a verdict for the Defendant, WEST FLAGLER ASSOCIATES, d/b/a FLAGLER DOG TRACK, having been rendered on the 24th day of July, 1992, in words and figures as follows to wit:

"We the jury find for the Defendant.

So say we all.

Wilber Williams
(Printed, not signed)
Foreperson

Dated: July 24, 1992"

and said verdict having been duly received, filed and recorded, it is

ORDERED AND ADJUDGED that Final Judgement be, and the same is hereby entered in favor of the Defendant and against the Plaintiff's and the Defendant shall go hence without day and shall have and recover of and from the Plaintiff it's tazable costs, if any, for all of which said sum let execution issue.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 24th day of July, 1992.

s/ Paul Siegel
CIRCUIT JUDGE

IN THE DISTRICT COURT

OF APPEAL OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D.

1994

WILLIAM WALSH Appellant,	**	
vs.	**	Case No. 92-01920
WEST FLAGLER ASSOCIATES, LTD. Appellee.	**	

Opinion Filed: June 21, 1994.

An Appeal from the Circuit Court for Dade County, Paul Siegel, Judge.

William Walsh, in proper person.

Marlow, Connell, Valerius, Abrams, Lowe and Adler. Joseph Lowe, for Appellee.

Before BARKDULL, NESBITT AND LEVY, JJ.

PER CURIAM

Affirmed

IN THE DISTRICT COURT

OF APPEAL OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1994

JULY 19, 1994

WILLIAM WALSH
Appellant,

vs.

WEST FLAGLER
ASSOCIATES, LTD.
Appellee

** Case No. 92-01920

Upon consideration, appellant's motion for rehearing of opinion is hereby denied.

BARKDULL, NESBITT AND LEVY, JJ.

CONCUR.

A True Copy

ATTEST:

Louis J. Spalone

Clerk, District Court of Appeal,

Third District

By: s/ Ann E. Geonin
Deputy Clerk

cc: William Walsh Joseph Lowe
/NB